INJUNCTION—ACTION ON BOND—RECOVERY OF COUNSEL FEES.—A bond was given in an injunction suit, conditioned that in case of the dissolution of the injunction the plaintiff in that suit should pay all judgments and costs as might be awarded against him "and also such damages as may be incurred or sustained by the defendant." The injunction was dissolved by a decree of the Circuit Court and that decree was affirmed by the Supreme Court of Appeals. Defendant in the injunction suit now brings action on the injunction bond for recovery of damages on account of fees of counsel in defense of the injunction. *Held,* Counsel fees may be recovered for procuring an affirmance of the Circuit Court decree dissolving the injunction. *State ex. rel. Citizens' Nat. Bank* v. *Graham et al.* (1910), — W. Va. —, 69 S. E. 301.

By the great weight of authority counsel fees incurred in procuring the dissolution of an injunction improperly or wrongfully issued are recoverable as damages upon the injunction bond if it appears that this expense was occasioned by reason of the issuance of the injunction. *Porter* v. *Hopkins,* 63 Cal. 53; *Nielsen* v. *Lea,* 87 Minn. 285, 91 N. W. 1113; *Harrison* v. *Harrison,* 75 Hun 191, 26 N. Y. Supp. 965; *Riddle* v. *Cheadle,* 25 Ohio St. 278. In a few jurisdictions a contrary view is held. *Sullivan* v. *Cartier,* 147 Fed. 222; *Oliphint* v. *Mansfield,* 36 Ark. 191; *Sensenig* v. *Parry,* 113 Pa. St. 115, 5 Atl. 11. In Kentucky, counsel fees will not be allowed upon the dissolution of an injunction unless the injunction is ancillary to the action. *Fidelity Co.* v. *Tinsley,* 30 Ky. Law Rep. 1095, 100 S. W. 272. If no attempt is made to dissolve the injunction, and its dissolution is only incidental to the determination of the main issue, or if it appears that no fees have been expended by reason of the injunction other than those expended in the general defense of the suit, no counsel fees are recoverable if the injunction is dissolved upon a final hearing of the cause. *San Diego Water Co.* v. *Pacific Co.,* 101 Cal. 216, 35 Pac. 651; *Independent College* v. *Zeigler,* 86 Ill. App. 360; *Barre Water Co.* v. *Carnes,* 68 Vt. 23. Yet in case the trial of the principal issue is for any reason necessary to the disposition of the injunction, counsel fees may be recovered. *Holloway* v. *Holloway,* 103 Mo. 274, 15 S. W. 536; *Youngs* v. *McDonald,* 56 App. Div. 14, Aff. 166 N. Y. 639, 60 N. E. 1123. If the injunction is merely auxiliary or incidental to the main object of the suit, and its dissolution is only incidental, no counsel fees will be allowed. *Weierhauser* v. *Cole,* 132 Iowa 14, 109 N. W. 301; *Cunningham* v. *Finch,* 63 Neb. 189, 88 N. W. 168; *Noble* v. *Arnold,* 23 Ohio St. 264. Counsel fees expended in an unsuccessful attempt to dissolve cannot be recovered although it was finally determined that the injunction was wrongfully issued. *Pollock* v. *Whipple,* 57 Neb. 82, 77 N. W. 355; *Lyon* v. *Hersey,* 32 Hun 253, Aff. 100 N. Y. 641, 3 N. E. 797; *Garlington* v. *Copeland,* 43 S. C. 389, 21 S. E. 317; but see *Neilsen* v. *Lea,* supra. On the question whether counsel fees, incurred on error or appeal for services incurred in the dissolution of the injunction, are recoverable the cases are in conflict. Some of the courts in accord with the principal case hold that they are. *Jesse Piano Co.* v. *Porter,* 134 Ala. 302, 30 S. W. 687; *Lambert* v. *Haskall,* 80 Cal. 611, 22 Pac. 327; *Ryan* v. *Anderson,* 25 Ill. 372. Other courts say that the undertaking will be strictly construed and the liability will not be extended beyond a final de-

cision in the lower court so that fees should be limited to services in procuring a dissolution in that court. *Ellwood* v. *Rankin,* 70 Ia. 403, 30 N. W. 677; *Neiser* v. *Thomas,* 46 Mo. App. 47; *Town of Gifford* v. *Cornell,* 4 Abb. Pr. 220. Where the injunction is the main relief sought, counsel fees for services rendered upon appeal are not recoverable. *Barre Water Co.* v. *Carnes,* supra. As to the amount of the fees, there is no fixed rule. They must be reasonable and fair (*Chicago Door Co.* v. *Parks,* 79 Ill. App. 188) and limited to that part of the defense that is rendered necessary on account of the issuance of the injunction, excluding any fees caused by the defense of the main suit either before or after the dissolution of the injunction. *Curry* v. *Am. Mortg. Co.,* 124 Ala. 614, 27 South. 454; *Robertson* v. *Smith,* 129 Ind. 422, 28 N. E. 857.

INJUNCTION—GROUNDS—RESTRAINT OF THE ENACTMENT OF AN ORDINANCE. —By the charter of the City of Minneapolis the City Council was authorized to regulate and designate where certain kinds of business and amusements might be located and carried on. The City Council passed an ordinance by which the establishment of certain of such enterprises was prohibited absolutely within the territory described therein. Thereupon, before said ordinance was approved by the mayor and published, the plaintiffs, who were the owners of a large part of the land specified in the ordinance as prohibited territory, brought an action against the city, its mayor, and clerk to enjoin and restrain them from "executing or attempting to put into operation said ordinance and from signing or approving, publishing or causing the same to be published." *Held,* Action cannot be maintained. *Basting* v. *City of Minneapolis* (1910), — Minn. —, 127 N. W. 1131.

The decisions are uniform to the effect that courts will enjoin the enforcement of unconstitutional statutes and ordinances subsequent to their enactment. *Cicero Lumber Co.* v. *Cicero,* 176 Ill. 9, 51 N. E. 758, 68 Am. St. Rep. 155, 42 L. R. A. 696. The courts also seem to agree that a municipal corporation in the exercise of legislative power in relation to subjects committed to its jurisdiction can no more be enjoined than can the legislature of a state, except when the mere passage of the ordinance would immediately occasion or would be followed by some irreparable loss or would cause a multiplicity of suits. *Des Moines Gas Co.* v. *Des Moines,* 44 Iowa 505, 24 Am. Rep. 756; *Montgomery Gas Light Co.* v. *Montgomery,* 87 Ala. 245, 4 L. R. A. 616; *Spring Valley Water Works* v. *Bartlett,* 16 Fed. 615, 8 Sawy. 555. A conflict of authority arises, not in the enunciation of the last named rule and of the exceptions thereto, but in the interpretation which is to be placed thereon. (1) As to what constitutes a legislative act. *People* v. *Sturtevant,* 9 N. Y. 263, 59 Am. Dec. 536, holding that the passing of a resolution granting a street railway the right to use the streets, by laying tracks and running cars, is not an act of municipal legislation and therefore an injunction to restrain the enactment would lie. Contra, *Des Moines Gas Co.* v. *Des Moines,* 44 Iowa 505, 24 Am. Rep. 756, holding that a grant to a gas company of the right to use the streets by laying pipes therein was a legislative act and therefore injunction would not lie. The latter would seem to be the